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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 275

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY AND THE OHIO RIVER COMPANY, APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

Pursuant to paragraph 1(c) of Rule 16 of the Revised Rules of this Court, appellees, United States of America and Interstate Commerce Commission, move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court dismissing appellants' suit to set aside an order of the Interstate Commerce Commission. The Commission's order[1] required the

[1] The Commission's report and order, 315 I.C.C. 129, embraced two Investigation and Suspension proceedings, I. & S. 7368,

appellants to cancel a joint barge-rail rate of $3.36 per net ton, in minimum lots of 5,000 net tons, for the movement of bituminous coal from Huntington, West Virginia, via Mount Vernon, Indiana, to the Chicago, Illinois district, because the rate was non-compensatory, and therefore, unjust and unreasonable under Section 1(5) of the Interstate Commerce Act.

The traffic here involved originates at mines in eastern Kentucky and southern West Virginia, and the service to be performed under the joint barge-rail rate includes (1) terminal service at Huntington, W. Va. (switching cars and dumping coal into barges) by the Ohio River Company (River Company); (2) transportation by barge on the Ohio River from Huntington to Mount Vernon, Indiana, by the River Company; (3) intermediate terminal service at Mount Vernon (lifting coal from barges to cars) by a private contractor employed by the River Company; and (4) transportation via the Chicago & Eastern Illinois Railroad Company (C&EI) from Mount Vernon to the Chicago district for interchange to delivering lines (App. 2, 11).

The cost of the C&EI rail movement from Mount Vernon to Chicago has been the subject of two prior Commission proceedings. In *Ex-River Coal from Mount Vernon, Ind., to Chicago*, 296 I.C.C. 489 (1955), the Commission (Division 2) indicated approval of a 1953 ex-river rate of $1.89, subject, among other

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Barge-Rail Coal from Huntington, West Virginia to Chicago District, and I. & S. 7524, *Coal via Barge-Rail-Huntington, West Virginia to Chicago, Illinois.*

things, to a minimum of not less than 2,000 net tons. Because of authorized general railroad increases, this rate was subsequently increased to $2.08 (J.S. 7). The C&EI's proposal to lower the rate to $1.89 was denied by the Commission in *Ex-River Coal, Mount Vernon, Ind., to Chicago District,* 308 I.C.C. 87 (1959), and 310 I.C.C. 181 (1960) (referred to herein as I. & S. 7011). The Commission found that the cost of this movement *in 1957* was $2.045, but at wage and price levels for *November, 1958,* the out-of-pocket cost would be $2.15 (308 I.C.C. 90-91; 310 I.C.C. 186).[2] The parties stipulated that the record in I. & S. 7011 would be made a part of the record in the present proceeding (App. 1, 11).

Although the Commission had found that the C&EI's costs as of November, 1958, would be at least $2.15, the C&EI published a joint rate of $3.36 with the River Company under which the C&EI would receive a division of $2.04 (App. 2, 12). The only difference in the C&EI's handling of the traffic under the ex-river rate ordered cancelled in I. & S. 7011,

[2] Appellants assert that the Commission in I. & S. 7011 found the out-of-pocket costs to be $2.045 (J.S. 7). This disregards the Commission's finding that the C&EI's out-of-pocket costs as of November 1958 for handling coal from Mount Vernon to Chicago was at least $2.15 (App. 12), and the confirmation of such finding by the district court (App. 2). This C&EI proportional ex river rate became $2.11 upon application of the increase authorized in *Ex Parte* 223 and the reasonableness of this rate, which remained in effect after cancellation of the $1.89 rate, is under consideration in *Baltimore & Ohio Railroad Company, et al.* v. *Chicago and Eastern Illinois Railroad Company, et al.*, Docket No. 33706.

and the joint barge-rail rate here at issue, is that the coal cars are not weighed en route for revenue billing purposes (App. 2).

The evidence before the Commission in the present proceeding as to the C&EI's cost of operation consisted of conflicting Rail Form A [3] analysis of the C&EI's costs submitted by appellants and by protestant railroads. The Commission relied on the presentation of the protestant railroads because their application of the formula reflected 1959 experience, the most current at the time of the hearing (App. 3). However, in determining the C&EI's costs, the Commission utilized the adjustments developed by the C&EI in I. & S. 7011, and basic unit costs reflecting physical characteristics of the movement [4] (App. 3). The Commission restated three items of cost utilized by the protestant railroads: (1) origin terminal cost at Mount Vernon; (2) switching cost at Brewer Yard; and (3) the method of applying a trending factor to reflect increased costs experienced in wages and prices of material to the time of hearing (App. 3). In each instance the result of the Commission's restatement of protestant railroads' figures was to produce a lower out-of-pocket cost.

[3] Rail Form A is a formula developed by the Cost Finding Section of the Commission for use in determining rail freight service costs.

[4] The Commission used the following performance factors in developing the characteristics of the traffic at issue: (1) average load per car of 66.7 tons; (2) car tare weight of 22 tons; (3) an empty return ratio of 91 percent; (4) through train weights of 5,916 tons; (5) destination switching cost of $36.41; and (6) four days' detention of the car in Chicago (App. 3).

Both appellants and protestant railroads also submitted conflicting cost figures for the River Company's portion of the movement. The Commission relied on the evidence submitted by the protestant railroads inasmuch as the River Company did not submit underlying data to support its computations (App. 14). The Commission found that the out-of-pocket expense incurred by the River Company from in-cars at Huntington to in-cars at Mount Vernon approximates $1.268, including (1) an out-of-pocket line-haul barge cost of 94.7¢; (2) a dumping charge at Huntington of 16.1¢; and (3) a transfer cost at Mount Vernon of 16¢[5] (App. 6, 14–15).

In setting forth its findings as to the C&EI's out-of-pocket costs the Commission in the body of its report (App. 11–14) discussed the conflicting contentions of the parties, and compared the evidence submitted in this proceeding with the evidence incorporated in the record from the I. & S. 7011 proceeding. In the Appendix to its report in this proceeding, the Commission broke down the rail service involved into ten underlying service units, comparing as to each the out-of-pocket cost as computed by the C&EI with the Commission's findings as to these costs (App. 16, the column designated as "restated"). This breakdown of the C&EI's costs in an appendix is similar in form to the method employed by the Commission in its report in the prior I. & S. 7011 proceeding (310 I.C.C. at 187).

[5] The Commission noted that in I. & S. 7011 it appeared that the Mount Vernon charge was 25 cents a ton as performed by an independent contractor, the dumping charge at Huntington

The three-judge district court found that the Commission's findings were supported by substantial evidence of record (App. 1–6).[6] The court found ample support in the record for the Commission's conclusion that the out-of-pocket cost incurred by the River Company from in-cars at Huntington to in-cars at Mount Vernon is, at least, $1.268, and the out-of-pocket cost

was 25 cents, and the barge line-haul cost was shown as $1—a total costs of $1.50 (App. 15). The Commission pointed out that the 16¢ cost figure for transfer at Mount Vernon presented by appellants would be subject to increase if the traffic should fall below 55,000 tons in a single month (App. 15). Appellants contend (J.S. 18–19) that the Commission improperly applied a 2.9 percent trending factor to the River Company's operating costs from Huntington to Mount Vernon. The Commission, in the case of the River Company's costs, accepted the evidence of the protestant railroads, and no evidence is cited in the record to show that the 2.9 percent trending factor was incorrectly developed or applied.

[6] The trial court's findings of fact recite in detail the evidence supporting each of three restated items of cost (App. 3–6). For example, as to the cost figure for switching at Brewer Yard, to which appellants take particular exception (J.S. 16–17), the lower court quoted the Commission's finding (App. 4), and pointed out the evidence in support of the finding: (1) trains would be stopped at Brewer Yard for crew change; (2) the 5,916 ton train weight employed by the C&EI in support of its argument that there would be no switching substantially exceeded the daily average tonnage moving from Mount Vernon to Chicago (daily average tonnage during the 213 days of 1960 from January through July was 3,449.86 tons); and (3) to attain an average train weight of 5,916 tons inter and intratrain switching would be necessary to pick-up and set-off the additional traffic (App. 4–5). The trial court found that there is substantial evidence in the record to justify a finding that at least one inter or intratrain switch would take place in the 305 mile distance between Mount Vernon and Chicago (App. 5). Moreover, the lower court noted that even if the Commission had erred, it was not prejudicial error, since the rate would still be below out-of-pocket cost (App. 5).

incurred by the C&EI to handle the rail movement from Mount Vernon to Chicago is, at least, $2.1476, producing a through out-of-pocket cost of $3.416 (App. 6). The rate of $3.36 was thus 5.6¢ per ton below the out-of-pocket cost of performing the barge-rail movement here at issue.

ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court.

1. Appellants argue (J.S. 19–31) that the Commission's report fails to contain detailed findings of fact supporting its conclusion that the rate at issue is non-compensatory. Although the Commission in its report and attached appendix broke down the out-of-pocket costs into the underlying service units involved, comparing findings as to these units with the Commission's findings in the prior I. & S. 7011 proceeding, and with the cost figures submitted by appellants in the present proceeding (App. 11–16),[7] appellants urge that the Commission's findings are deficient because

[7] The care with which the Commission scrutinized the evidence is shown by its determination of the proper car-detention time at Chicago. The Commission pointed out that the C&EI determined the car-detention to be 2.67 days from an analysis of 765 owned cars during March, 1958 (App. 13). The protestants argued that 4 days should be used, as accepted by the Commission in I. & S. 7011 (App. 13). The Commission noted that protestants had introduced evidence showing that 1,030 cars were detained an average of 7.93 days based on interchange records (App. 12a). The Commission found that 4-days car-detention at Chicago was supported by the record (App. 13, 14, 16), and on that basis the non-compensated freight-car expense at Chicago would total $10.0655, rather than $5.0022 as the C&EI contended (App. 16).

it failed to explain exactly how certain cost figures were derived, in particular the switching cost at Brewer Yard (J.S. 25) and the River Company's costs (J.S. 28).

The court below, after a careful review of the evidence, entered findings of fact as to the restated costs challenged by appellants[8] (App. 1–6), and concluded that the order of the Commission is supported by findings based upon substantial evidence in the record (App. 7). There is no occasion for further review of these factual issues. *Radio Corporation of America* v. *United States,* 341 U.S. 412, 420; *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490–491; *United States v. Pierce Auto Freight Lines, Inc.,* 327 U.S. 515, 536.

Appellants suggest that it was error for the court to conclude that the Commission "is only required to set out ultimate and not evidentiary facts supporting its conclusions." (J.S. 22; App. 6.) In the context of the present case, where the Commission has entered findings on the various underlying service units comprising the out-of-pocket cost of the movement in sufficient detail to disclose the basis of its judgment, the trial court's statement is plainly correct. The Commission has never been required to detail every calculation or computation underlying its conclusion. It is sufficient, as this Court has recently had

[8] The district court found that the Commission had properly determined each of the underlying cost figures, including the three restated costs, and the River Company's costs, pointing out the evidence in support of the findings of the Commission (App. 3–6).

occasion to reiterate, for the Commission to set forth its conclusions and reasons on the material issues of fact, law or discretion presented on the record. Section 8(b) of the Administrative Procedure Act, 60 Stat. 237, 242, 5 U.S.C. § 1007(b); *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 167–168 (1962). Appellants' argument (which in substantial part restates its argument in the district court, J.S. 13, 14) largely ignores the district court's analysis of the Commission's findings, which fully demonstrates the sufficiency of the report. See *Minneapolis & St. Louis Ry.* v. *United States,* 361 U.S. 173, 192–94; *Alabama G. S. Ry.* v. *United States,* 340 U.S. 216, 227–28; *United States* v. *Pierce Auto Freight Lines, supra,* at 531–32.

2. Appellants argue that, even assuming the joint barge-rail rate is non-compensatory, the unlawful rate must, under Section 3(4), be approved by the Commission because the C&EI's division of the barge-rail rate through the Mount Vernon Gateway is greater than the C&EI's division under an all-rail rate with the Louisville and Nashville Railroad Company through the Evansville Gateway (J.S. 32–33).

Appellants thus seek to raise in this Court issues which they did not raise before the Commission in their petition for reconsideration nor in their complaint or opening brief in the court below. Although the Section 3(4) issue was mentioned in their reply brief and in oral argument, appellants failed to request the lower court to rule on the matter in submitting their proposed findings of fact and conclusions of law, and the district court properly declined

to do so. *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 36–37. The issue was not preserved for review in this Court. *United States* v. *Baltimore & O. R. Co.*, 231 U.S. 274, 297; *Dayton Goose Creek R. Co.* v. *United States*, 263 U.S. 456, 487; *Pennsylvania R. Co.* v. *Public Utilities Commission*, 298 U.S. 170, 177.

Furthermore, appellants' belated suggestion of these Section 3(4) issues is not supported by evidence of record in this proceeding. Appellants offered no evidence to show that the L&N–C&EI movement over the Evansville Gateway is a substantially similar service at a competitive all-rail rate to the C&EI-River Company movement through the Mount Vernon Gateway with respect to this same coal traffic (J.S. 32). Certainly, the Commission is not divested of its power to order cancellation of a non-compensatory rate under Section 1(5) by the fact that the C&EI had accepted a lower division over another all-rail route, particularly where the only carrier whose rate divisions are asserted to be discriminatory are those of the C&EI. If the C&EI is dissatisfied with its lower rate divisions over the all-rail L&N route, or the River Company considers itself subject to discrimination by rail carriers, the remedy is to file a complaint with the Commission seeking relief. The issues which might be involved in such a proceeding were not presented for decision in this case.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the court below should be affirmed.

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